No. 2561

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHU TAI NGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Appellant respectfully petitions that the decision of this Court herein be set aside and that a rehearing of the cause be granted.

The grounds of the application are:

First. That the unfairness practiced by the immigration officers in securing and producing the statement of Police Officer Layne was not fully considered by this Court.

Second. That the statement of Police Officer Layne was irrelevant and incompetent and that this Court was in error in considering said statement as evidence.

Third. That the evidence in the case as to the identity of appellant was not fully considered by this Court.

In the opinion of the Court, it is stated that

> "The sole question is the sufficiency of the testimony to warrant the finding that she is a prostitute and found practicing prostitution, etc., subsequent to her entry."

The only evidence offered by the government in support of the finding that this appellant *is a prostitute and was found practicing prostitution* in the United States is a statement made by Police Officer Layne to Inspector J. A. Robinson (Trans. of Record, p. 27).

UNFAIRNESS.

In one of the latest reported cases on this subject, Judge Morton of the District Court of Massachusetts says:

> "The essential thing is that there shall have been an honest effort to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law."
>
> Ex parte Chin Loy You, 223 Fed. 833-835.

This is unquestionably a correct statement of the principle involved in these administration hearings.

The question which was before the immigration officers for determination in this case was whether this individual, the Chinese woman here called Chu Tai Ngan, was a prostitute and whether or not the circumstances and environment of her life would fairly show that she had actually engaged in the practice of prostitution since her entry into the United States, irrespective of her life before her entry.

The essential thing in the administrative investigation of this question was to make an honest effort to arrive at the truth of this question by fair and reasonable methods. It was for the immigration officers to produce the evidence and for the Secretary of Labor to determine the truth from that evidence.

The record of her examination (Trans. of Record, pp. 18 to 22 inclusive) indicates that she was in custody at Angel Island on November 21, 1912, at which time she gave the name of Jee Dai Ngan as the only name she bore. She stated that she had come to the United States with her husband who was a citizen of the United States and denied that she was a prostitute, or that she had ever been arrested as a prostitute. Her denials are categorical.

> "Q. How long have you been living an immoral life?
>
> "A. I have never lived an immoral life.
>
> "Q. Were you not arrested by the police officer three months ago and taken to the police court in a raid?
>
> "A. No.

"Q. Sergeant Layne of the police force told Inspector Robinson he identified you as he arrested you about three months ago.

"A. It must be a mistaken identity. I have never been arrested.

"Q. The records also show that you were fined $50 for being an immoral woman at that time and the fine was paid. What have you got to say to that?

"A. No, never such case" (Trans. of Record, pp. 19 and 20).

It will be noted that the last question by the examining inspector is not a statement of the fact as claimed by Layne. Layne only claims that the woman he arrested forfeited $50.00 bail in the police court rather than undergo the hardship of the inevitable deportation proceedings. That she was correct in her fears is evidenced by the present results since the order for her deportation was accomplished by the single fact that she had been arrested by Layne in a place which once bore the general reputation of a house of prostitution and was by the police officer accused of being an inmate of the place.

Not one scrap of evidence was offered by the Government as to when, how, where or by whom she was arrested. It cannot be presumed, therefore, that at the time of her arrest by the immigration authorities she was in any way connected or associated with prostitutes or houses of ill-fame, or that she was at that time engaged in prostitution.

The immigration officers were familiar with the circumstances under which they secured her custody.

If they had arrested her while engaged in prostitution or in a house of prostitution, they would have produced the proof of it. But the details of her arrest is withheld from the record and we submit that this is not an honest endeavor to place before the Secretary all of the circumstances and evidence from which he could fairly draw his conclusion. The conclusion is irresistible and the presumption fair that the circumstances of the arrest did not indicate that she was on that occasion engaged in the practice of prostitution. At the time of the arrest, no evidence was in the hands of the immigration officers to support the charge that this woman was a prostitute. The circumstances of the arrest did not support it or evidence would have been produced. The examination of the woman herself failed to develop any evidence against her. Resort was therefore had to the police in the endeavor to show that the woman had been a prostitute or had practiced prostitution on some former occasion.

On November 27, 1912, a statement by Police Officer Layne, was secured by Inspector Robinson at the Hall of Justice in San Francisco (Trans. of Record, p. 27).

The charge against the woman is that she is a *prostitute,* and was found *practicing prostitution.* Layne did not state or even intimate that he had found her practicing prostitution. He did not state that he had ever been informed that she had ever practiced prostitution. He stated only that he had

been informed that some women were being held by warring highbinder tongs in a place that, on March 22, 1912, had the general reputation of a house of prostitution. He went to the place and his information proved correct as he found there a woman whom he arrested and *charged* with being an inmate of a house of prostitution.

At the time this statement was taken, appellant was in custody of the immigration officers. She had denied ever having been arrested. She had asserted on November 21, that there was a mistake as to her identity. Yet she was not taken before Layne for identification. Layne was not even shown her photograph. He was asked to identify this appellant by his recollection of a woman he had seen with Inspector Robinson and a name he supposedly had heard a week prior. All this was done without notice to the detained woman or her counsel. This statement of Layne's is all the evidence offered to the Secretary. There was no more evidence given him. There was no more to give.

This we submit was not an honest effort to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law.

In Ex parte Chin Loy You (supra, p. 835, the Court says:

> "There is, however, a tendency in the decisions of the Supreme Court on this subject to safeguard the individual against the tremendous and arbitrary power given to the Immigration Bureau by reserving to the courts the right to scrutinize with some freedom the fairness of

> the proceedings. In the Tang Tun case, 223 U. S. 673, careful consideration was given to the evidence upon which the Immigration Department acted and it was held to have been fairly taken and to be legally sufficient. See too, Lui Hop Fong v. U. S., 209 U. S. 453."

We think that the tendency to hold a restraining hand on the administrative officers in their zeal to enforce the terms of the immigration law is becoming more evident in the attitude of not only the Supreme Court but on the part of the appellate Courts in the various circuits.

We think that the Courts have made it clear, even in those cases where they have endorsed the findings and decisions of the administrative officers, that the scope of their authority in considering the proceedings of the executive bureaus is considerably broader than has been conceded in the past by the officials of such bureaus.

Lin Hop Fong v. U. S., 209 U. S. 453;
School of Magnetic Healing v. McAnnulty, 187 U. S. 94;
Interstate Commerce Commission v. Louisville Nashville R. R. Co., 227 U. S. 88;
Chin Yow v. U. S., 198 U. S. 253;
Tang Tun v. Edsell, 223 U. S. 673;
Lewis v. Frick, 233 U. S. 291;
Zakonaite v. Wolf, 226 U. S. 272;
Ex parte Chin Loy You (supra);
Whitfield v. Hanges, 222 Fed. 745;
Ex parte Petkos, 212 Fed. 275;
U. S. v. Chin Len, 187 Fed. 544;

U. S. v. Williams, 185 Fed. 598;
U. S. v. Williams, 193 Fed. 228;
In re Rosser, 101 Fed. 562;
U. S. v. Sibray, 178 Fed. 144;
Roux v. Commissioner of Immigration, 203 Fed. 413;
Howe v. Parker, 190 Fed. 738;
U. S. ex rel Klein v. Williams, 189 Fed. 915;
U. S. ex rel Geigow v. Uhl, 215 Fed. 373;
Ex parte Lam Pui, 217 Fed. 456.

IRRELEVANCY AND INSUFFICIENCY.

The Immigration Bureau is reluctant to concede to the Courts any rights whatever on the question of the evidence in administrative proceedings. It has been the tendency of the bureau to claim sole and exclusive control of all matters connected with the facts and the evidence and to deny the Court the jurisdiction to interfere with their findings and decisions. Reluctantly, it has been conceded that the findings of the Secretary of Labor must be based upon some evidence. Reluctantly or otherwise, in the face of the decisions of our highest tribunals, it must be conceded that the evidence on which an administrative order is based must be relevant, competent and sufficient.

We have shown that the Courts have freely and fully considered the evidence in numerous cases.

In the case at bar, assuming that the statement of Layne is evidence and was taken fairly, we

assert that it is evidence of nothing relevant to the inquiry which was before the Immigration Bureau.

The rule as to relevancy of the evidence necessary to sustain an order of deportation is perhaps more clearly applied in Ex parte Petkos (supra) and U. S. ex rel Klein v. Williams (supra) than in most of the other cases.

In the first case the evidence was that Petkos had a skin disease known as psoriasis which the board of special inquiry found was a disease with a disagreeable odor and appearance from which they concluded that the alien would find difficulty in securing work and therefore was likely to become a public charge. That the man had the skin disease mentioned was not disputed but that it was evidence that he was likely to become a public charge was disputed with success before the Court.

The case of U. S. ex rel Klein v. Williams (supra) is peculiarly in point here. Klein sought admission to the United States with his wife. It was first held by the Immigration Bureau that their relations were immoral. That ground was abandoned and they were denied on the ground that they were likely to become public charges. There was plenty of evidence of a kind considered by the immigration officers but none competent or relevant to the inquiry, and the Court held that if there is no evidence that an alien immigrant is within one of the excluded classes the immigration officers have no

right to exclude and the order of deportation is a nullity.

Among the evidence considered was a telegram from Hungary that Klein had been *arrested* by the police of that country for fraud and forgery. The Court said in that regard:

> "There is no evidence that they committed any crime in Hungary. The suspicion that they did so is based on a cablegram received by the Austrian Consul.
>
> "'Isidor Klein was arrested by this police department for fraud and forgery on March 12, 1911'."

The Court further said:

> "Nor is there any evidence that he and his wife are likely to become public charges."
>
> U. S. ex rel Klein v. Williams (supra, p. 917).

It would perhaps be impertinent for us to offer to this Court a discussion as to the meaning of relevancy of evidence. In the case at bar, the investigation was whether or not this woman is a prostitute. Evidence that she was arrested and charged with being an inmate of a house of prostitution by a police officer was not relevant to the inquiry before the immigration officers. Nor is evidence that such a woman was held by warring Chinese factions in premises having the reputation of a house of prostitution relevant to an inquiry concerning the woman's occupation. Nor is the fact that she stated to the arresting officer that she had no occupation evidence that she is a prostitute. This we conceive to be elementary. Whether

or not she forfeited $50.00 bail has no relevancy to the issue. It is evidence of nothing other perhaps than that she was afraid of the immigration officers—in which she was justified as we have pointed out. It is not a question of flight. She was not seeking to avoid the process of the criminal law. She sought to avoid the summary proceedings which she believed awaited her at the hands of the immigration officers. Such is the evidence. If there be anything relevant in the statement of Layne, then it would be an easy matter to fasten crime on any individual who might find himself surrounded by suspicious circumstances.

It may be true that our analysis of Layne's statement may be technical, but it is in this statement alone that the proof must be found that will justify the deportation of this Chinese woman. If the proof be not there, then the presumption is in favor of the woman. If Layne had had anything further to say against the woman he would have done so. It is to be presumed that he knew nothing further regarding her. *Expressio unius est exclusio alterius* and *expressum facit cessare tacitum.*

It may be true that executive hearings are not judicial, but relevancy of evidence is necessary in the investigation of any fact in courts, bureaus or in the world at large. Furthermore, it cannot be maintained that the executive bureaus, in making an honest effort to ascertain the truth, may cast aside the fundamental principles of evidence such as the wisdom of ages has demonstrated to be only means by which facts may be safely or fairly be considered proved.

Indeed the executive officers are not permitted so to do.

> "The decision shall be governed by and based upon the evidence of the hearing and that only, and that decision shall not be without substantial evidence taken at the hearing to support it."
>
> Whitfield v. Hanges (supra, p. 749).

See also

In re Rosser, 101 Fed. 562-567;
Ex parte Petkos (supra);
U. S. v. Sibray (C. C., supra, p. 149);
Lui Hop Fong v. U. S. (supra).

Administrative orders and findings quasi-judicial in character are void if the finding is contrary to the "indisputable character of the evidence".

School of Magnetic Healing v. McAnnulty (supra);
Interstate Commerce Commission v. Louisville & Nashville R. R. Co. (supra);
Howe v. Parker (supra);
Cited in Whitfield v. Hanges (supra).

In Ex parte Lam Pui, 217 Fed. 456, it was held that the Court may determine, on habeas corpus, whether, *when tested by well-settled principles,* there was evidence giving the Secretary of Labor jurisdiction to order the deportation. Lam Pui entered the United States with a so-called "Section 6" certificate issued by the Chinese government. It was claimed that he secured his entry by fraud, in that he made fraudulent representations in re-

spect to his status as a student. It is held by the Court that it must be shown by evidence, and not merely by *suspicious circumstances or conjecture,* that he obtained such certificate by means of fraudulent representations. The Court held that the evidence on which the order of deportation was made was *insufficient* to sustain the charge.

In Ex parte Lam Fuk Tak, 217 Fed. 468, it was held that the evidence was *insufficient* to sustain the charge that the detained secured his certificate as a merchant by false representations.

It was also held that it was manifestly improper for the immigration inspector to insert in the examination *his own unverified* statement without offering himself as a witness in the regular way and his statement could not support a warrant of deportation.

We call attention in this regard that this sort of impropriety was practiced by the examining inspector against this appellant when he examined her at Angel Island, November 21, 1912 (Trans. of Record, pp. 18 to 22 inclusive).

We have pointed out that the inspector in this examination erroneously asserted that the records of the police court of San Francisco showed that the appellant had been *fined* $50.00 upon a charge of being a prostitute. And the record of this examination shows further instances where the inspector inserted into the record for the eyes of the Secretary such unverified statements as "How long have you been living at the house of prostitution where you

were arrested last night?" and "How long have you been living an immoral life?" (Trans. of Record, p. 19). We do not believe that unfairness could be made plainer. The inspector could not testify to these things as a witness and yet they were submitted to the Secretary along with the rest of the record.

In Lim Sam v. U. S., 189 Fed. 534, the Court holds that

> "Notwithstanding repeated illegal acts of Chinamen attempting to enter the United States, their testimony should be carefully weighed and *there should be no radical departure from the rules of evidence* in determining the weight to be given to the testimony."

COMPETENCY.

But the statement of Layne is not evidence. It is clearly incompetent and should not have been submitted to or considered by the Secretary of Labor.

The statement of Layne is represented to have been made under oath administered by Inspector Robinson.

But Robinson had no authority to administer an oath in this case. The power of an immigrant inspector to administer an oath is limited to administering oaths touching the right of any alien to *enter* the United States.

> Act of Feb. 20, 1907, C. 1134, Sec. 24, 34 Stat. 906 (Comp. Stat. 1913, Sec. 4273).

In Whitfield v. Hanges (supra) a very similar question arose and evidence similar to this statement of Layne's was held to be incompetent and that it was improper for even the executive officers to consider it.

The question involved was whether or not the place operated and maintained by the detained men was a resort for prostitutes.

The statements of certain prostitutes were taken by the inspector and police officers secretly and before the hearing was had, at which the detained were supposed to be afforded an opportunity to show cause why they should not be deported.

At the hearing these statements were not offered in evidence, as the Court says, for the reason that they were incompetent and could not be received in evidence.

But after the hearing, when the proceedings were closed, these statements were submitted to the Secretary as evidence that the cafe operated by the detained was a resort for prostitutes.

In that regard, the Court says:

> "But whether or not there was any substantial evidence at the hearing in support of those charges and of the finding of the inspector that they were proved and of his recommendations that the aliens be deported, under which the appellees were being deprived of their liberty, *is a question of law,* the power and duty to determine which are vested in the Courts and any injurious error in deciding that question by any executive or quasi-judicial of-

ficer or tribunal is reviewable and remediable by them."

Whitfield v. Hanges (supra, p. 751).

Again the Court says:

"During the hearing the inspector permitted counsel for the appellees to read the statements he and the police officers had drawn from the prostitutes before the arrest was made, but neither he nor the government offered or introduced these statements in evidence, *nor would they have constituted evidence if offered, because, since the inspector had no authority to administer oath,* they were not sworn to, because they were statements of prostitutes extracted in secret in the ever present fear which the call or seizure by police or other officers on persons of their character unavoidably imposes upon them and because these women had not been called to the hearing and the appellees had no opportunity to cross-examine them.

"After the hearing, the inspector made and forwarded his report and recommendations to the effect that appellees were guilty of the charges and that they should be deported. This report states the evidence on which it is founded and discloses the fact that it is based, not on the evidence at the hearing, but on the statements of the prostitutes extracted before the arrest, which are condensed and recited in the report and on rumors and hearsay which are set forth in the report, in support of which there was no evidence in the case of which the accused had notice and which he had no opportunity to refute by evidence or otherwise."

Whitfield v. Hanges (supra, p. 753).

A Chinaman cannot be deported for having fraudulently entered the United States unless there is *competent* evidence to overcome the legal effect of

the certificate issued as provided by Sec. 3 of the Treaty of December, 1894.

Lui Hop Fong v. U. S., 209 U. S. 453.

The Chinaman in the last mentioned case had entered the United States as a student with a certificate provided by the Chinese government. The immigration officers sought to deport him on the ground that he had fraudulently secured his entrance.

In discussing the evidence in the case, Justice Day says:

> "While this certificate may be overcome by proper evidence and may not have the effect of a judicial determination, yet having been made in conformity to the treaty, and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported, as in this case, because of wrongfully entering the United States upon a fraudulent certificate, unless there is some *competent* evidence to overcome the legal effect of the certificate. In this record we can find no *competent* testimony which could overcome such legal effect of the certificate."
>
> Lui Hop Fong v. U. S. (supra, p. 463).

IDENTITY.

In the case at bar we submit that the Immigration Bureau utterly failed to show the identity of this appellant with the woman Di Ung whom Layne arrested.

We have pointed out the unfairness and lack of good faith toward the detained woman in the man-

ner in which Layne's statement was secured. She had denied having been arrested by Layne. Yet Inspector Robinson made no effort to identify her by the method which ordinary care and common fairness would have dictated.

Layne said he had once arrested a woman known as Di Ung—a name in no way similar to Jee Dai Ngan, the only name given by this appellant (Trans. of Record, p. 18), or Chu Tai Ngan as she is named in the warrant (Trans. of Record, pp. 12 and 17).

Layne then goes on to say that he saw and recognized Di Ung in the person of a Chinese woman who was in custody of Inspector Robinson on November 20, 1912, who gave the name of "Gee Dai, alias Chew Tai Ngan" (Layne's statement, Trans. of Record, p. 27).

The only possible claim that the Immigration Bureau can make that this appellant was identified as the woman Di Ung is by the names last given by Layne to wit: "Gee Dai alias Chew Tai Ngan". If the bureau relies upon any principle of law that identity of name presumes an identity of person they have failed in their proof. The three names given by Layne, Di Ung, Gee Dai, and Chew Tai Ngan, may have some similarity to, but none of them are identical with the name given by appellant, Jee Dai Ngan.

But aside from this the record contains the denials of various persons that this appellant is the Di Ung

referred to by Layne (testimony offered in defense, Trans. of Record, pp. 30 to 49 inclusive).

The sworn affidavit of Benjamin I. Block, a reputable attorney of San Francisco, absolutely refutes the assumption that this appellant and Di Ung are the same person. Mr. Block was the attorney for the woman arrested by Layne and his testimony is worthy of consideration (Trans. of Record, pp. 35 and 36).

To the same effect is the affidavits of Hom Huey, the man who advanced the bail for Di Ung (Trans. of Record, pp. 39 and 40), and Wong Po Chin, the interpreter (Trans. of Record, pp. 37 and 38).

It would have been an easy matter to settle this matter by taking this woman or her photograph to Layne. But such was not done and the testimony of Mr. Block and the Chinese witnesses are unimpeached.

While we concede to the Secretary of Labor the greatest latitude in believing or disbelieving testimony placed before him, yet we deny that he has the right to totally reject the unimpeached testimony of reputable witnesses.

In Whitfield v. Hanges (supra) and in others of the cases cited, the Court considered fully the testimony and evidence offered on behalf of the detained parties.

> "The Courts should not be expected to ignore altogether the testimony of witnesses who tell a candid and consistent story and who stand unimpeached."
>
> Mar Poy v. U. S., 189 Fed. 288.

DUE PROCESS.

"The inhibition of the 14th Amendment means that no agency of the state or of the officers or of the agents by whom her powers are exerted shall deny to *any person* within her jurisdiction the equal protection of the law. Whoever, by virtue of his public position under a state government deprived anyone of life, liberty or property, without due process of law, violates that inhibition."

Ex parte Virginia, 110 U. S. 339.

See also

Neal v. Delaware, 103 U. S. 94;

Cited in Whitfield v. Hanges (supra).

"An alien, as well as a citizen, is protected by the prohibition or deprivation of life, liberty or property, without due process of law. This principle is universal and applies to all persons within the territorial jurisdiction of the United States without regard to any difference of race, color, or nationality."

Yick Wo v. Hopkins, 118 U. S. 356-369.

For the foregoing reasons, we earnestly and respectfully urge the Court to grant this petition for a rehearing.

Dated, San Francisco,
November 1, 1915.

Respectfully submitted,

CATLIN, CATLIN & FRIEDMAN,
Attorneys for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Harry C. Catlin,
Of Counsel for Appellant and Petitioner.